CORRUGATED CARTON PRODUCTS SDN BHD

v.

KONG LONG HUAT REALTY SDN BHD

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
ABDUL MALEK AHMAD FCJ
ABDUL HAMID MOHAMAD FCJ
[CIVIL APPEAL NO: 02-18-2003 (W)]
21 MAY 2004

CONTRACT: *Sale and purchase of land - Agreement - Termination by vendor on grounds that purchaser failed to pay balance of purchase price within agreed period - Whether termination proper - Extension of time stipulated in cl. 3(a) of agreement - Whether purchaser entitled as of right for extension of time to make payment thereof - Whether purchaser's failure to ask and apply for extension fell to its disadvantage*

The respondent terminated a sale and purchase agreement of a piece of land ('the agreement') entered into with the appellant on the basis that the appellant failed to pay the balance of the purchase price within the agreed period. The appellant claimed that by virtue of cl. 3(a) of the agreement the appellant was entitled to an extension of time to pay the balance of the purchase price. The appellant filed an action against the respondent for specific relief and alternatively for damages but it was not successful in the High Court and neither on appeal to the Court of Appeal.

Hence the appellant's appeal to the Federal Court on the following three questions, namely, whether cl. 3(a) thereof entitled the appellant for an extension of time to complete the agreement as of right; whether cl. 3(a) required the appellant to apply or ask for the extension; and whether cl. 3(a) merely required payment of interest for the extension of time.

Held (dismissing the appeal)
Per Abdul Malek Ahmad FCJ delivering the judgment of the court:

[1] The appellant fell into error when it attempted to give an interpretation of cl. 3(a) of the agreement on a piecemeal basis instead of reading the provision as a whole. Read in its entirety, it was clear beyond doubt that the completion date was ninety days after the execution of the agreement. But a further extension of thirty days shall be given by the respondent upon payment of interest on the outstanding balance of the purchase price. (p 8 d)

[1a] The respondent would not have known that the appellant needed an extension of time to complete the agreement. This was because there was no interest paid by the appellant for the extension period and neither was there any notification that an extension was needed despite the exchange of correspondence during the crucial period before and after the expiry of the initial period of three months. Accordingly, the first question should be answered in the negative whilst the second and third questions should be answered in the positive. Additionally for the third question, a notification for the extension was essential before the expiry of the initial period and a written undertaking to pay, as opposed to actually paying the interest for the extension period, would have sufficed. (p 8 e-g)

*[**Bahasa Malaysia** Translation Of Headnotes*

Responden telah menamatkan satu perjanjian jual beli sebidang tanah ('perjanjian') yang dimeterainya dengan perayu atas alasan bahawa perayu gagal membayar baki harga belian dalam tempoh yang ditetapkan. Perayu mengatakan bahawa berdasarkan fasal 3(a) perjanjian ia berhak kepada satu lanjutan masa bagi membayar baki harga belian. Perayu telah memfail tindakan terhadap responden untuk relif tertentu dan secara alternatifnya untuk gantirugi, tetapi telah gagal di kedua-dua Mahkamah Tinggi dan Mahkamah Rayuan. Perayu dengan itu merayu ke Mahkamah Persekutuan dan berhujah atas tiga persoalan, iaitu, sama ada fasal 3(a) di atas memberinya hak untuk mendapatkan lanjutan masa sekaligus membenarkannya menyempurnakan perjanjian sebagai suatu hak; sama ada fasal 3(a) menuntut perayu supaya memohon lanjutan masa; dan sama ada fasal 3(a) hanya menuntut bayaran faedah bagi memperoleh lanjutan masa.

Diputuskan (menolak rayuan)
Oleh Abdul Malek Ahmad HMP menyampaikan penghakiman mahkamah:

[1] Perayu tersilap apabila cuba mentakrif fasal 3(a) secara sedikit demi sedikit dan tidak membaca peruntukan-peruntukannya secara keseluruhan. Membaca fasal 3(a) secara keseluruhan, ianya jelas bahawa tarikh penyempurnaan adalah 90 hari dari tarikh pelaksanaan. Namun, satu lanjutan masa tambahan selama 30 hari apabila faedah dibayar untuk baki harga belian yang tertunggak.

[1a] Responden tidak dapat mengetahui sama ada perayu memerlukan lanjutan masa untuk menyempurnakan perjanjian. Ini kerana tiada sebarang faedah dibayar oleh perayu bagi mendapatkan tempoh lanjutan dan tidak juga terdapat apa-apa notis bahawa lanjutan masa diperlukan walaupun terdapat pertukaran surat-menyurat di antara mereka dalam tempoh genting berkenaan dan selepas tamat tempoh pertama tiga bulan tersebut.

Oleh itu, persoalan pertama harus dijawab secara negatif, sementara persoalan-persoalan kedua dan ketiga harus dijawab secara positif. Sebagai tambahan kepada persoalan ketiga, satu notifikasi untuk lanjutan masa sebelum tamatnya tempoh pertama adalah perlu. Begitu juga, untuk mendapatkan lanjutan masa, satu akuan bertulis untuk membayar faedah adalah memadai, dan tidaklah perlu untuk membuat pembayaran sebenar faedah tersebut.

Case(s) referred to:
Jeow Fong Mei (P) v. Chong Mee Yoke [1996] 2 CLJ 23 CA ***(refd)***

Legislation referred to:
Rules of the High Court 1980, O. 33 r. 2, O. 81
Specific Relief Act 1950, s. 18(2)

For the appellant - Dr Wong Kim Fatt (Christina Chia Li Eng & Khor Loke Yew); M/s Christina Chia Ng & Partners
For the respondent - Karpal Singh; M/s Karpal Singh & Co

[Appeal from Court of Appeal; Civil Appeal No: W-02-82-1999]

Reported by Usha Thiagarajah

JUDGMENT

Abdul Malek Ahmad FCJ:
The respondent is the registered proprietor of land held under Lot No. 8761, CT 25148, Mukim Kajang in Selangor. The appellant entered into a sale and purchase agreement dated 11 October 1989 with the respondent to purchase it at the agreed price of RM550,000. At the time of execution of the agreement, the appellant had paid the respondent RM50,000 and by cl. 3(a) thereof, the appellant was to pay the balance of RM500,000 on or before 9 January 1990.

It is appropriate to reproduce cl. 3(a) of the agreement at this juncture:

3(a) Completion of the sale and purchase hereunder of the said property shall take place within a period of Ninety (90) days from the date of this Agreement (hereinafter referred to as "the Completion Date"). Provided always and it is hereby agreed by and between the parties hereto that the Vendor shall grant to the Purchasers an extension of a further thirty (30) days in respect of the Completion Date but upon payment of interest on the outstanding balance of the purchase price at the rate of eight point five per centum (8.5%) per annum calculated on a daily basis during the period of extension.

By letter dated 2 January 1990, the solicitors for the appellant's financier informed the solicitors for the respondent that they were agreeable to release the balance of the purchase price to the solicitors for the respondent upon receipt of the issue document of title and certain undertakings from them. These terms were repeated in a subsequent letter from the solicitors for the appellant's financier dated 10 January 1990.

The solicitors for the appellant, also by letter dated 10 January 1990, informed the solicitors for the respondent that the appellant had complied with cl. 3(a) of the agreement and were not liable to payment of interest under cl. 3(a) thereof. On that same date, the solicitors for the respondent had informed the appellant that the respondent was terminating the agreement with immediate effect and promised to refund the deposit paid by the appellant.

The solicitors for the appellant informed the solicitors for the respondent by letters dated 12 January 1990 and 2 February 1990 that the appellant did not accept the respondent's unfair termination made unilaterally and reiterated that the appellant was ready, able and willing to complete the transaction. Accordingly, the appellant filed an action against the respondent asking for specific relief, and alternatively, for damages.

The appellant's application for summary judgment under O. 81 of the Rules of the High Court 1980 (hereinafter "the RHC") was dismissed by the High Court which held that there were issues of law and fact to be tried.

The appellant then filed a summons in chambers for an order that the following issues be heard pursuant to O. 33 r. 2 of the RHC namely:

(a) whether cl. 3(a) of the agreement dated 11th October 1989 entered into between the plaintiff as purchaser and defendant as vendor relating to that piece of land held under C.T. 25148 Lot No. 8761 Mukim Kajang, Daerah Ulu Selangor Darul Ehsan, entitles the plaintiff to an automatic extension of 30 days for completion upon payment of interest of 8.5% per annum calculated on a day to day basis during the extension period;

(b) other related issues including whether the said agreement of sale and purchase was validly terminated.

The learned High Court Judge held that the extension of time under cl. 3(a) of the agreement was not automatic but subject to the payment of interest and the appellant had failed to pay the balance of the purchase price on 9 January 1990. It was also clear, she said, that under cl. 14 of the agreement, time was of an essence and it was crucial for the balance of the purchase price to be paid on or before 9 January 1990 should the extension of time is not obtained.

She added that there was no evidence that the appellant had applied for the extension of time when they could not pay the balance of the purchase price. She also said that no other action was taken to show that the appellant had done all that they were required to do and this was fatal to a claim for specific relief. Not only did the appellant not pay the balance of the purchase price within the agreed period, she said, but they had not asked for the extension of time from the respondent knowing that the balance of the purchase price could not be paid on the expiry date of the agreed period.

The claim for specific relief was dismissed with costs. However, the learned High Court Judge referred to s. 18(2) of the Specific Relief Act 1950 which states:

> If in any such suit the court decides that specific performance ought not to be granted, but that there is a contract between the parties which has been broken by the defendant and that the plaintiff is entitled to compensation for that breach, it shall award him compensation accordingly.

She said the termination of the contract was due to the appellant and not the respondent and, therefore, she dismissed the appellant's claim for damages. She, however, allowed the respondent's claim for the RM50,000 deposit to be forfeited to the respondent based on cl. 9 of the agreement which states:

> 9. In the event that the Purchasers fail for any reason whatsoever (save and except upon the rescission of the sale and purchase referred to in Clauses 11 & 12 hereunder) to complete the sale and purchase of the said property the Vendor shall forfeit from the Deposit paid herein the sum of Ringgit Fifty Thousand (Rgt 50,000.00) only as agreed liquidated damages and cause the remainder of the Deposit and all other monies paid hereunder by the Purchaser to be refunded to the Purchasers and the Purchasers shall where vacant possession of the said property has been delivered re-deliver vacant possession of the same to the Vendor and thereafter neither party shall have any claim against the other and the Vendor shall be at liberty to sell or otherwise deal with the said property in such manner and to and with such persons as the Vendor shall deem fit without tendering or offering the said property to the Purchasers.

Dissatisfied with this decision, the appellant appealed to the Court of Appeal. The Court of Appeal agreed with the finding of the High Court, as regards cl. 3(a) of the agreement, as can be seen from the relevant excerpts of the Court of Appeal judgment reproduced below:

12. Reverting to the present case we agree that the words "shall grant" appearing in clause 3(a) taken by themselves would mean that the defendant is under obligation to grant the extension to the plaintiff without the plaintiff having to apply for the extension. However, as stated above word or words in an agreement ought not to be construed in isolation, they need to be construed within the context of the agreement as a whole. Looking at clause 3(a) it is clear that the plaintiff is required to complete the purchase of said property within 90 days of the date of the agreement. This 90-day period, however, is subject to a further extension of 30 days upon payment of interest by the plaintiff on the balance sum at the stipulated rate. The question that arises is whether this interest is payable only if the plaintiff decides to proceed with the purchase or is payable in any case whether the plaintiff decides to proceed with the purchase or otherwise. We think the answer to this question is crucial to the issue before us whether the plaintiff needs to give notice of its intention to have the Complete Date extended or otherwise. What clause 3(a) provides is that the purchaser is entitled to an extension of the Completion Date "upon payment of interest on the outstanding balance…". In our view the plain meaning of this would be that the purchaser will have to pay interest on the balance sum if he wants to have the Completion Date extended. Thus, by necessary implication, in order to bring this provision into effect it is incumbent upon the purchaser to notify the vendor of his intention to have the Completion Date extended.

13. In the present case not only the plaintiff failed to notify the defendant of its desire to have the Completion Date extended but in its solicitors' letter of 10.1.1990 the plaintiff contended that it is not obliged to pay the interest on the balance sum since it has fulfilled all its obligations under clause 3(c).

14. However, from the undisputed facts before the court we find that on the completion Date neither the balance of the purchase price had been paid nor the necessary undertaking had been furnished to the stakeholders. Further, as we have said earlier, the plaintiff also failed to notify the defendant of its intention to have the Completion Date extended. Therefore, based on those facts we are of the view that the defendant was clearly acting within its right in terminating the agreement vide its letter of 10.1.1990.

Apparently, learned counsel for the appellant relied heavily on the case of *Jeow Fong Mei (P) v. Chong Mee Yoke (P)* [1996] 2 CLJ 23 to substantiate his point about the automatic right to the extension period but the issue there is clearly distinguishable as the expiry date of the extension period was in issue and the termination was sent one day too early. Here, there is no dispute as to the expiry date of the initial three month period.

As regards the respondent's counterclaim, the Court of Appeal varied the order of the learned High Court Judge by summarising the situation in the following manner:

> 16. Looking at the order of court dated 3.1.1999 it is clear that the learned judge had allowed the counterclaim by the defendant for the sum of RM50,000 and further ordered that an interest of 8% p.a. be paid on the said sum to be calculated from 9.1.1990 until full payment. From the facts before the court it is not in dispute that the said sum of RM50,000 was paid by the plaintiff to the defendant on or before the execution of agreement pursuant to clause 2(a). This is further confirmed by the defendant's letter of 10.1.1990 in which the defendant proposed that all the deposits paid by the plaintiff be refunded to the plaintiff. Therefore, we agree with the contention of the plaintiff that it is erroneous on the part of the court to allow the counterclaim by the defendant on those terms. In our view that the correct order would have been that the sum of RM50,000 being the deposit paid under the agreement be forfeited to the plaintiff pursuant to clause 9. Since the said deposit had already been paid to the defendant therefore the order by the learned judge for payment of interest by the plaintiff on the said sum also ought to be set aside.
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> 17. There is one other issue raised by the plaintiff's counsel with regard to the forfeiture of the deposit. He contended that since the defendant in its letter of 10.1.1990 offered to refund all deposits to the plaintiff therefore rightly no order of forfeiture of the deposit should, in the circumstances, be made against the plaintiff. Learned counsel for the defendant countered by saying that the offer for refund was made with a view of the parties reaching an amicable settlement on the matter, however, since the plaintiff had elected to commence legal action against the defendant the offer could not be taken against the defendant. Reading the relevant part of the letter we agree with the contention of the learned counsel for the defendant that the offer to refund the deposit made by the defendant is subject to the plaintiff agreeing to treat the agreement as null and void. Since the plaintiff refused to treat the agreement as null and void, therefore, naturally the offer no longer stands. In the circumstances, we think the defendant is entitled to have the deposit forfeited in accordance with clause 9.
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> **Conclusion**
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> 18. For the above reasons we dismissed the plaintiff's appeal herein with costs, however, the order of the court directing the plaintiff to pay to the defendant the sum of RM50,000.00 together with interest of 8% p.a. thereon is hereby set aside and we substitute, therefore, with an order that the sum of RM50,000.00, being the deposit paid to the defendant, be forfeited to the defendant.

On 10 November 2003, this court gave leave to the appellant to appeal on the following questions:

(a) whether a clause in a sale and purchase agreement such as that found in clause 3(a) of the said agreement entitles the purchaser in the agreement an extension of time to complete, as of right;

(b) whether a clause in a sale and purchase agreement such as that found in clause 3(a) of the said agreement requires or necessitates the purchaser to "apply" or "ask" for the extension;

(c) whether a clause in a sale and purchase agreement such as that found in Clause 3(a) of the said agreement merely requires payment of interest for extension of time (assuming the same is payable) to be paid on a daily basis for the actual number of days of extension when the balance purchase price is paid.

In these circumstances, we are of the view that the appellant fell into error when they attempted to give an interpretation to cl. 3(a) of the agreement on a piecemeal basis instead of reading the provision as a whole. Read in its entirety, it is clear beyond any doubt that the completion date is ninety days after the execution of the agreement but a further extension of thirty days shall be given by the respondent upon payment by the appellant of interest on the outstanding balance of the purchase price at the rate of 8.5 per cent per annum calculated on a daily basis during the extension period. With no interest paid by the appellant for the extension period and without any notification that an extension was needed despite the exchange of correspondence during the crucial period before and after the expiry of the initial period of three months, how was the respondent to know that the appellant needed an extension to complete the agreement?

Having considered the authorities and the arguments, we are in full agreement with the findings of the High Court and the Court of Appeal as regards the interpretation of cl. 3(a) of the agreement and would answer the first question in the negative, the second question in the positive and the third question in the positive but we must add that, for the third question, a notification for the extension is essential before the expiry of the initial period and a written undertaking to pay, as opposed to actually paying, the interest for the extension period, would have sufficed.

Accordingly, we would dismiss the appeal with costs. The deposit is to go to the respondent to the account of taxed costs.